UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CYTOLOGIX CORPORATION, Plaintiff, v. VENTANA MEDICAL SYSTEMS, INC., Defendant.	04-11783 (RWZ)

JOINT STATEMENT PURSUANT TO FRCP 26(f) AND LOCAL RULE 16.1(d)

In accordance with Local Rule 16.1(d), plaintiff CytoLogix Corporation, Inc. ("CytoLogix") and defendant Ventana Medical Systems, Inc. ("Ventana") submit this joint statement in preparation for a Scheduling Conference pursuant to Fed. R. Civ. P. 16(a) and Local Rule 16.1(a), scheduled for December 1, 2005. This statement is based upon the conference of counsel that was held on November 23, 2005, pursuant to Fed. R. Civ. P. 26(f) and Local Rule 16.1(b) regarding an agenda for matters to be discussed at the scheduling conference and a proposed pretrial schedule for the case.

I. Summary of Discovery Conducted to Date

The parties have served their Initial Disclosures pursuant to Local Rule 26.2(A). The parties have served written discovery, including interrogatories and document requests. CytoLogix has taken two depositions.

II. Proposed Discovery and Motion Plan

A. Scope of Discovery

Additional discovery may be needed on the subjects of the patent-in-suit, infringement, willful infringement, validity, claim interpretation, and damages. The parties wish to conduct

remaining discovery in two phases. The first phase of discovery concerns the issue of liability and willfulness, and discovery shall be limited to issues relevant thereto. Following a trial on the issue of liability, a second phase of discovery (if necessary) will concern the issue of damages, and discovery shall be limited to issues relevant thereto.

The documents produced, filed, or served in the matter of *CytoLogix Corp. v. Ventana Med. Sys., Inc.*, Case Nos. 00-12231 & 01-10178, shall be deemed produced in the present litigation. If either party no longer has access to or is missing documents from that case, the parties will work together in good faith to exchange copies. The parties reserve their objections as to those documents, including as to relevance and admissibility. Documents previously designated "confidential" will be subject to the protective order to be entered in this case, and until a protective order is entered, access to such documents will be limited to outside counsel of record.

The parties have agreed that the presumptive discovery limits set forth in the Federal Rules of Civil Procedure and the Local Rules shall apply.

The parties have also agreed that the schedule in this case shall proceed independently of *CytoLogix Corp. v. Ventana Med. Sys., Inc.*, Case Nos. 00-12231 & 01-10178. Neither party shall seek to delay, stay, or otherwise impede the progress of this case based on events or scheduling in *CytoLogix Corp. v. Ventana Med. Sys., Inc.*, Case Nos. 00-12231 & 01-10178, absent agreement of the other party. The parties shall not seek to stay or delay discovery or trial in this case pending any additional trials in *CytoLogix Corp. v. Ventana Med. Sys., Inc.*, Case Nos. 00-12231 & 01-10178 or any appeal in that case to the Court of Appeals for the Federal Circuit.

B. Reply Briefs

The parties have mutually consented to reply briefs on all motions, provided the Court so allows. Reply briefs shall be filed within ten (10) days after service of the opposition motion to which it responds.

C. Scheduling

The parties have not reached agreement as to certain scheduling issues. Their respective positions are set forth as follows:

1. Plaintiff's Proposal

EVENT	PROPOSED DEADLINE
Deadline for joining additional parties and amending pleadings	December 28, 2005
Fact discovery cutoff	February 3, 2006
Deadline for the parties to identify trial experts for issues on which they bear the burden of proof and to serve the written reports for each such expert	February 17, 2006
Deadline for the parties to identify any rebuttal experts and to serve the written reports for each such rebuttal expert	March 17, 2006
Deadline for completing expert discovery	April 3, 2006
Deadline for filing non-dispositive motions	April 14, 2006
Target trial commencement date	July 3, 2006

Plaintiff believes that this schedule is appropriate, given that discovery commenced in this case well over one year ago. Moreover, the parties originally contemplated and agreed upon a proposed schedule that would have prepared the case for trial in as little as one year. *See* Exhibit C. Lastly, Plaintiff's pending motion for summary judgment should resolve any

outstanding Markman issues quickly, so that claim construction will not be an impediment to expert reports and discovery.

2. Defendant's Proposal

EVENT	PROPOSED DEADLINE
Markman opening briefs	January 27, 2006
Markman response briefs	February 24, 2006
Markman hearing	The parties request a hearing before March 24, 2006
Deadline for joining additional parties and amending pleadings	April 14, 2006 or two weeks after the Markman ruling, whichever is later
Fact discovery cutoff	May 26, 2006 or two months after the Court's ruling on Markman issues, whichever is later
Deadline for the parties to identify trial experts for issues on which they bear the burden of proof and to serve the written reports for each such expert	June 23, 2006 or one month after the close of fact discovery, whichever is later
Deadline for the parties to identify any rebuttal experts and to serve the written reports for each such rebuttal expert	July 21, 2006 or one month after initial expert reports, whichever is later
Deadline for completing expert discovery	August 18, 2006 or one month after rebuttal expert reports, whichever is later
Deadline for filing non-dispositive motions	September 15, 2006 or one month after the close of expert discovery, whichever is later

Defendant proposes that a trial date be selected at a Scheduling Conference to take place following issuance of the Court's Markman ruling.

Defendant believes that its proposal is consistent with the spirit of the agreement already reached by the parties regarding the schedule for this case, which provided for an early Markman hearing and subsequent discovery deadlines in regular intervals following Markman proceedings. *See* Exhibit C. Scheduling fact and expert discovery to follow the Court's Markman ruling can avoid the confusion that would be caused by experts who lack a definitive claim construction upon which to base their opinions. *See CytoLogix Corp. v. Ventana Med. Sys., Inc.*, 424 F.3d 1168, 1172 (Fed. Cir. 2005).

D. Dispositive Motions

CytoLogix has moved for summary judgment of infringement. The parties disagree about the schedule for remaining briefing on this motion.

CytoLogix' Position: CytoLogix's combined motion for claim construction and summary judgment presents a narrow issue for the Court, i.e. whether CytoLogix's new patent covers Ventana's attempted design around. This issue collapses into a single claim construction dispute. The information necessary to reply to the motion is wholly in Ventana's control, namely, the patent, file history, cited art and accused devices. Moreover, this motion marks a pivot point not just for this civil action, but for all of the outstanding disputes between the parties. In CytoLogix's view, summary judgment of infringement would cause sufficient pressure, and bring sufficient clarity to foster a global settlement. Accordingly, CytoLogix requests that Ventana reply to this motion by December 21, 2005. CytoLogix would then have until January 18, 2006 to submit a reply brief.

Ventana's Position: Ventana should be given an opportunity to take the depositions of the three named inventors of the patent-in-suit prior to responding to the summary judgment motion. Such discovery is relevant to the claim construction issues that underlie the motion.

Accordingly, Ventana requests that its response to the motion be due four weeks following completion of the inventor depositions.

Prior to the time CytoLogix filed motion, Ventana had already requested the inventor depositions. The parties were in the process of identifying potential deposition dates. The Federal Circuit has explained that inventor testimony "may be helpful to explain scientific principles [and] the meaning of technical terms" in order to "aid the court in the construction of the patent." *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 980 (Fed. Cir. 1995) (en banc), *aff'd*, 517 U.S. 370 (1996). Furthermore, CytoLogix's motion (pp. 11-12) prominently relies upon statements made in an Interview Summary. Prior to filing its response, Ventana should be provided the opportunity to question the inventor who attended and participated in that interview.

III. Discovery Limitations

The parties agree to the limitations on discovery set forth in Local Rule 26.1(c) except that the parties agree to increase: (1) the number of depositions for each side to 10 fact depositions and an appropriate number of expert depositions to be determined; and (2) the number of separate sets of requests for production to three such sets. This initial proposed modification of the rules shall be without prejudice to any party's subsequent application for leave to take additional fact depositions.

IV. Trial by Magistrate Judge

The parties do not consent to trial before a Magistrate Judge.

V. Settlement

Plaintiff has provided a written settlement proposal to Ventana.

VI. Stipulated Protective Order

The parties have negotiated and submitted a stipulated protective order [Docket No. 34].

VII. Certifications

Plaintiff's certification pursuant to Local Rule 16.1(d)(3) is attached hereto as Exhibit A. Ventana's certification is attached as Exhibit B.

Dated: November 28, 2005

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